

FCC MAIL SECTION

Federal Communications Commission

FCC 96D-04

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	MM DOCKET NO. 96-104
)	
Southwestern Broadcasting Corporation)	File No. BRH-900315UC
)	
For Renewal of License)	
for Station KLZK(FM))	
Brownfield, Texas)	
)	

Appearances

Lawrence J. Bernard, Jr., Esq. on behalf of Southwestern Broadcasting Corporation and *Kenneth M. Scheibel, Esq.* on behalf of the Chief, Mass Media Bureau

**SUMMARY DECISION
OF
ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL**

Issued: July 25, 1996**Released: July 29, 1996**

1. This case was set for hearing by Hearing Designation Order ("HDO") (DA 96-657), released April 29, 1996. A Prehearing Conference was held on June 6, 1996. The parties represented that they had agreed to negotiate the terms of a Consent Order which might result in the renewal of the license of Southwestern Broadcasting Corporation ("SBC"). In view of the treatment of silent stations under the Telecommunications Act of 1996,¹ an important ingredient to a viable settlement would be an expedited review by the Mass Media Bureau ("Bureau") of an upgrade application which SBC had filed after the case was designated for hearing. An agreed schedule was incorporated into a ruling as recommended by the parties. See Order FCC 96M-151, released June 10, 1996.

¹ Section 403(1) of the Telecommunications Act of 1996 [47 U.S.C. §312(g)] provides for the automatic expiration of licenses if a broadcast station fails to transmit signals for any consecutive 12-month period. The relevant period of the silence is that of the station and not that of the licensee or facility. Special temporary authorities to remain silent or other such transactions will not toll or extend the 12-month period. Nor can the Commission prevent automatic expiration of a license by waiver. The new law leaves no room to compromise and allows for no discretion. See Commission Order FCC 96-218, released May 17, 1996, 61 Fed. Reg. 28,766 (June 6, 1996).

2. On June 21, 1996, the Bureau reported that it had reviewed its policy under the facts of this case and concluded that the amendment sought after the release of the HDO would not be expedited. Cf. Procedures Announced For Expedited Processing Of Applications Filed By Silent Broadcast Stations (DA 96-818), released May 22, 1996 (expediting procedures contemplated where silent stations seek to return to the air). For further clarification, on July 3, 1996, the Bureau filed a Memorandum Of Law And Policy wherein it stated:

Under existing policy, the Bureau will not process a modification application filed after a silent station is designated for hearing. ---. The Commission's Public Notice [supra] is a narrow exception to the Bureau's existing policy -- not applicable here.

Under the circumstances, SBC was authorized to seek a summary decision. See Order FCC 96M-168, released July 1, 1996.

3. On July 5, 1996, SBC filed a Motion For Summary Decision. The Mass Media Bureau's Comments In Opposition To Motion For Summary Decision And Countermotion For Summary Decision was filed on July 19, 1996. On July 24, 1996, SBC advised that it would accept a summary decision based on the present state of the record without filing a responsive pleading to the countermotion.²

4. SBC contends that it could not return Station KLZK(FM) to the air because intervening short spacing caused by authorizations to KMMX(FM), KIOL-FM and KKYN-FM prevented SBC's upgrade or downgrade or restoration to Channel 280A. The Bureau contends that under various scenarios of short-spacing SBC has always had an option to return to the air.

FACTS

Actions of Previous Owner

5. Station KLZK(FM) [formerly KKTC(FM)] is licensed to serve Brownfield, Texas as a Class A FM station. The HDO concludes and SBC concedes that the station has been off the air (silent) for seven years. In 1988, the Station's previous owner, Brownfield Broadcasting Corp. ("Brownfield"), informed the Commission that it had suspended operations pending Commission action on its petition to upgrade to a C2 facility and an associated application to relocate the

² See Southwest's Conditional Waiver Of Opposition Rights. The Bureau advises that it does not necessarily concur that under Commission rules there is any right to respond to a countermotion. See 47 C.F.R. §1.253(b) (any other party may file an opposition or a countermotion for summary decision.) See also Summary Decision Procedures, 34 F.C.C. 2d 485, 490 (1972). The Bureau correctly notes that there is no comparable provision in the rule for responding to a countermotion. Since both parties are relying on the same record and the Bureau has not filed any counter-affidavit, there would be no need to consider a responsive pleading and therefore SBC would not be prejudiced.

transmitter site. The rulemaking petition was granted on December 14, 1987. In 1988, Brownfield advised the Commission that it had suspended the Station's operations pending application on the upgrade and approval of a relocation of transmitter site and an increase in power on Channel 282C2. On September 28, 1988, Brownfield's upgrade proposal was accepted by the Bureau in Report and Order, 3 F.C.C. Rcd 6158 (1988) provided that there was compliance with minimum spacing to an existing Carlsbad, NM site. In October, 1989, Brownfield applied to implement the upgraded facilities. While the 1989 upgrade application was pending, the Station remained silent. On February 23, 1990, Brownfield filed a request to assign the Station to SBC. On March 15, 1990, while that application to assign was pending, Brownfield filed the renewal application which is the subject of this proceeding. The assignment application was granted shortly thereafter and SBC assumed ownership of Station KZLK(FM) on May 4, 1990.

Intervening Short-Spacing

6. In December 1990, Station KKYN(FM) (Plainview, TX) was authorized to change frequencies and upgrade to Channel 280C1. KKYN's upgrade would eventually preclude KLZK's resumption of service on its authorized Channel 280A. But SBC still had options to return to the air. See Report and Order (MM Docket 88-571), 4 F.C.C. Rcd 8788 (1989) (KLZK authorized to "continue or reestablish operation" on Channel 280A at anytime until the KKYN upgrade construction permit was issued). The Report and Order also contemplated that KKZK(FM) could thereafter pursue its Channel 282C2 upgrade or file an application to downgrade to Channel 282A in lieu of operating on Channel 280A. See Report and Order 4 F.C.C. Rcd at 8788.

7. The options for SBC were narrowed to seeking the Channel 280A downgrade because in March 1992, the month prior to the license grant for Station KKYN(FM), SBC's upgrade application had been dismissed by the Bureau due to short-spacing. (Motion at Exh. H.) No appeal of that dismissal was taken by SBC. Nor was there any corrected application filed for a Channel 282C2 upgrade, or any application for a Channel 282A downgrade prior to the designation of this case for a hearing.

8. In a related short-spacing, on March 25, 1988, the Bureau authorized Station KMMX-FM(Lamesa, TX) and Station KIOL-FM (Lamesa, TX) to exchange licenses so that KIOL could broadcast on Channel 262C1 and KMMX could broadcast on Channel 284C1. Both Stations received Special Temporary Authority ("STA") while the Bureau processed an application for permanent authority. (Motion Exh. B.) The STA sites also were short-spaced to the site at which SBC sought to operate KLZK(FM) on upgraded Channel 282C2. SBC represents that the STA authorized facilities were also short spaced to any Class A operation of KLZK(FM) on the same channel, i.e, Channel 282A. The KMMX(FM) facilities were granted successive STAs through September 6, 1996. (Motion at Exh. D.) But there was no effort made by SBC to have the STAs set aside in favor of its desired upgrade.

Actions of Current Owner

9. On July 1, 1990, SBC closed on the purchase of Station KLZK(FM). Crane states that he soon learned of the short-spacing problems through informal conversations with Bureau staff who advised Crane to work it out privately. Crane represents that in 1990 he hired an engineer and made a proposal to Station KIOL(FM) which was never answered. In January 1991, Crane directed a proposal to the Bureau. The Chief of the FM branch responded by letter dated January 30, 1991. (Motion at Exh.G.) In that letter the complexity of the situation was succinctly outlined: SBC was licensed to broadcast on Channel 280A and it was seeking an upgrade by modification application to move to Channel 282C2. By 1991, there had been a competing application filed on top of SBC's renewal application and there would be an unresolved short-spacing if the move to Channel 282C2 was approved. In addition, Crane's proposal would involve a change of frequency for stations in two separate communities which would involve a rule making. In January 1991, the Bureau advised Crane:

[We] encourage the filing of a petition for rulemaking, as such action would provide each party a forum to express its views as well as afford the Commission an opportunity to achieve a comprehensive solution in this matter.

(Motion at Exh G.) SBC did not follow-up on the advice in a manner calculated to return to the air. Nor did SBC obtain an STA to remain silent.

10. In 1989, Brownfield had filed an upgrade application. On March 17, 1992, the Brownfield proposal was dismissed by the Bureau as unacceptable for filing. See letter to Southwestern Broadcasting Corp. (Ref. 8920-JAG), dated March 17, 1992. (Motion at Exh. H.) SBC ascribes the dismissal to "relatively minor short-spacing problems unrelated to the KMMX STA operation" which could have been corrected. Crane represents that he did not consider refiling the dismissed application for several years because Crane thought that the operation of KMMX under an STA "made it impossible" to propose any facilities on Channel 282C2 which could serve Brownfield. However, an STA is by nature a temporary arrangement and therefore it can be revoked by the Commission at anytime that a favored upgrade application is filed.³

11. On December 2, 1992, the Bureau made a status inquiry of SBC which summarized the history and status of Station KZLK(FM) that presented the Station with three options: First, notify the Bureau that the Station had resumed Class A operations; second, advise the Bureau that operations would be resumed immediately; or third, request an STA to remain silent. (Motion Exh. A.) SBC chose the third option and requested an STA to remain silent for six months or until a permit was issued for an upgrade on Channel 282C2. Despite the advice of the Bureau to pursue the upgrade, no Channel 282C2 application was filed before issuance of the HDO. (Motion at Exh. I.)

³ See 47 C.F.R. §73.1635(b) (STAs may be modified or cancelled without prior notice.)

12. Station KLZK(FM) has been silent since before its assignment from Brownfield to SBC with no feasible corrective action taken by SBC until January 6, 1993, when a request was made to remain silent. That request was denied by the Bureau in a letter dated December 1, 1993 due to SBC's failure to submit a detailed timetable for resumption of operations. (Motion at Exh. A.)⁴ SBC informed the Bureau by letter dated February 21, 1994, that it would not restore service on a Class A channel because "it was not fiscally wise" to do so. (Motion at Exh. M.) Rather, SBC engaged in extended negotiations with the respective owners of KMMX-FM and KIOL-FM in an effort to gain an upgrade. Those negotiations partially succeeded in a rulemaking filed by KIOL-FM for a change of community which removed that short-spacing and the further extension of the STAs. See Notice of Proposed Rulemaking (MM Docket 95-58), 10 F.C.C. Rcd 4945 (1995), adopted 10 F.C.C. Rcd 11,018 (1995). According to the Bureau, that rulemaking was filed after SBC had entered into an agreement with the other licensees on December 31, 1993. (Motion at Exh. K.) The Bureau represents in its Comment that the further extensions of the KMMX and KIOL STAs during the pendency of the rulemaking were based upon SBC's negotiated agreement with those stations. Clearly, SBC was expending its resources in seeking a way to obtain an upgrade because that was perceived to be the most economically efficient way to proceed. It also shows that SBC was determined not to return to the air on a Class A frequency.

13. On May 8, 1996, obviously spurred by the HDO's release, SBC filed its Channel 282C2 upgrade application (File No. BPH-9605081A). Crane admits that it was not until after designation that he prepared the application and obtained permission to use a new transmitter site to operate on Channel 282C2. It was also after the designation of the case for a hearing that Crane prepared a projection of expenses and obtained a bank letter dated June 11, 1996, more than a month after the HDO. Crane now estimates, without providing a schedule, that it will take 90 days from renewal to construct and return to air.

CONCLUSIONS OF LAW

14. The Commission's rules provide that in considering a motion for summary decision:

The party filing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

⁴ In that same letter, the Bureau cancelled the KMMX-FM and KIOL-FM modification applications and related STAs. That definitive Commission action made it possible for SBC to resume broadcast operations on Channel 282A or to pursue its Channel 282C2 upgrade. The "primary problem" was identified in the letter as short-spacing with another station's proposal. However, the problem was SBC's to resolve and SBC took no action that would be effective under the rule.

47 C.F.R. §1.25(a)(1). The moving party has the burden of establishing that summary decision would be appropriate based on its papers. Summary Decision Procedures, 34 F.C.C. 2d 485, 487-88 (1972). For reasons stated below, it is concluded that SBC has not met its burden and that the facts as to which there is no genuine issue support the counter motion.

15. The issues set in the HDO for determination are as follows:

- (1) To determine whether Southwestern Broadcasting Corporation has the capability and intent to expeditiously resume the broadcast operations of KLZK(FM), consistent with the Commission's Rules.
- (2) To determine whether Southwestern Broadcasting Corporation has violated Sections 73.1740 [minimum operating schedule] and/or 73.1750 [discontinuance of operation] of the Commission's Rules.
- (3) To determine, in light of the evidence adduced pursuant to the preceding issues, whether grant of the subject renewal of license application would serve the public interest, convenience and necessity.

16. The facts as established by the papers submitted by SBC, as commented on by the Bureau, establish that there is no genuine issue of material fact in the following respects: First, SBC would only return to the air in connection with a C2 upgrade and would not take any steps to return Station KLZK(FM) to the air on a Class A frequency; second, as a result of SBC's failure to file applications for an upgrade on Channel 282C2 in the face of existing STAs and its failure to file an application to return to Channel 280A or to obtain a downgrade on Channel 282A, Station KLZK(FM) chose to remain silent for over six years; third, as a direct result of SBC's strategy to upgrade, Station KLZK(FM) has been silent since SBC acquired it on May 4, 1990.

17. It is accepted as a matter of law and policy that special temporary authorizations which result in temporary short-spacing do not preclude the Commission from terminating the STAs in order to remove short-spacing in granting an application for an upgrade. 47 C.F.R. §73.1635(b). See also Conflicts Between Applications and Petitions For Rulemaking, 7 F.C.C. Rcd 4917 n.3 (1992) (upgrade has priority over modification application and associated STA). While the record does not support a finding of intentional abandonment, the failure by SBC over a period of six years to seek authority to upgrade to Channel 282C2, or to use the once assigned Channel 280A, or to apply to downgrade to Channel 282A establish that as of April 29, 1996, the date of the release of the HDO, SBC had neither the capability nor the intent to resume the

broadcast operations of Station KLZK(FM) consistent with the Commission's rules.⁵ It is also determined that SBC has voluntarily violated Sections 73.1740 and 73.1750 of the Commission's Rules.⁶

ORDER

IT IS ORDERED that the Motion For Summary Decision filed on July 5, 1996, by Southwestern Broadcasting Corporation IS DENIED.

IT IS FURTHER ORDERED that the Countermotion For Summary Decision filed on July 19, 1996, by the Mass Media Bureau IS GRANTED.

IT IS FURTHER ORDERED that the renewal application of Southwestern Broadcasting Corporation (File No. BRH-900315UC) for renewal of license for Station KLZK(FM), Brownfield, Texas IS DENIED and the Station's license IS CANCELLED.⁷

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

⁵ Without expediting the postdesignation application, SBC probably would not have the capability to return to the air before February 8, 1997, when by operation of law all licenses to stations which have remained silent since February 8, 1996, shall terminate. See fn.1, *supra*.

⁶ These rules provide respectively for a required number of broadcast hours and the surrender of license for a discontinued operation.

⁷ In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision will become effective 50 days after its public release pursuant to Section 1.276(d).